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No. 44

In the Supreme Court of the United States

OCTOBER TERM, 1958

LOCAL LODGE [illegible], INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, AND BUELL MANUFACTURING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 44

LOCAL LODGE NO. 1424, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, AND BRYAN MANUFACTURING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (R. 466–477) is reported at 264 F. 2d 575. The decision and order of the National Labor Relations Board (R. 428–457) is reported at 119 NLRB 502.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1959 (R. 478–479). The petition for a writ of certiorari was filed on March 18, 1959, and granted on June 22, 1959 (R. 479, 360 U.S. 916). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 49–51.

QUESTIONS PRESENTED

More than six months prior to the filing and service of the charges in this case, the Company and the Union entered into a union security agreement which required employees to join the Union as a condition of employment. The agreement was executed when the Union did not represent a majority of the employees. The Board found that the enforcement of the agreement within the six-month period constituted an unfair labor practice since the Union was not, as the statute requires, the bargaining representative of the employees when it entered into the agreement.

The questions presented are:

1. Whether Section 10(b) of the Act (which precludes issuance of a complaint based upon any unfair labor practice occurring more than six months prior to the filing and service of the charges) bars the Board from taking into consideration the non-representative status of the Union when it entered into the agreement, for the purpose of determining whether enforcement of the agreement within six months of the filing and service of the charges constituted an unfair labor practice.

2. Whether the Board's order requiring the Company and the Union to reimburse the employees for dues and initiation fees checked off pursuant to the contract was valid and proper.

STATEMENT

I. THE BOARD'S FINDING OF FACT

Briefly, the Board found that the IAM violated Section 8 (b)(2) and (1)(A) and the Company [1] violated Section 8(a) (1), (2), and (3) of the Act, by maintaining and enforcing an agreement containing a union security clause, which was executed at a time when the IAM did not represent a majority of the employees in the unit. The Board also found like violations based on the execution and maintenance of a 1955 agreement, holding that such contract was merely an extension of the original illegal agreement (R. 437). The Board based its findings upon the following subsidiary facts:

A. EVENTS SURROUNDING THE EXECUTION OF THE 1954 AGREEMENT BETWEEN IAM AND THE COMPANY

1. The Company accepts the IAM claim of majority representation, without question as to its validity, and decides to recognize that union in July 1954

In July 1954, Leslie Westbrook, then plant manager of the Company's Reading Plant (R. 354; 28),[2] received a letter dated July 17, 1954, from IAM representative E. L. Schwartzmiller, and bearing the subject designation "Union Recognition." Without indicating the existence of any proof thereof, the letter

[1] Bryan Manufacturing Company is an Ohio corporation engaged in manufacturing electrical products at several plants in Ohio, Indiana, and Michigan. The two plants here involved are located in Reading and Hillsdale, Michigan.

[2] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

asserted that the IAM represented a majority of the "production and maintenance" employees of the plant, and requested an early meeting with the Company for purposes of negotiating a collective bargaining agreement (R. 356–357; 17, 324). The IAM did not, in fact, represent a single employee in the plant. After receiving the letter, on or about July 19, 1954, Westbrook telephoned company counsel Walter F. Probst, for advice. Probst stated that he "would advise recognizing them because he had been doing business with them in other plants" including plants in San Diego, California, Lancaster, Ohio, and Zanesville, Ohio. He stated further that he had found in his dealings with the IAM that whenever a company had "contested," the IAM had "won out," that he found them "fair to work with," that he was dealing with them at the time in Lancaster, that he thought that they "could get along" and that they "might as well go ahead and have the meeting with them." Without mentioning the possibility of a Board election or other means of ascertaining whether the IAM actually represented a majority, Probst indicated that if the Company did not "go ahead and arrange for a meeting," the Company would "get beaten in the end." He then asked Westbrook to mail the letter to him (R. 357–358; 29, 46–47, 59).

Approximately a week after this telephone conversation, Westbrook and Company Vice-President Adams met with Probst in Detroit at which time they decided to recognize the IAM. The three Company officials discussed some tentative contract provisions and arranged for a meeting with IAM representative

Schwartzmiller for August 10 in Lancaster, Ohio (R. 358; 48–49). At no time after receipt of the IAM letter did Westbrook raise any question as to whether Schwartzmiller had any authorization cards from the employees, or raise any other question concerning Schwartzmiller's claim of majority representation. He accepted this claim "on the strength of what" Probst had told him (R. 358; 59–60).

2. The IAM and the Company negotiate a basic agreement on August 10, 1954, which the Company signs

On Tuesday, August 10, 1954, Westbrook, accompanied by Company attorneys Probst and Galucci, met with Schwartzmiller in Lancaster, Ohio, as had been arranged, to negotiate an agreement (R. 358; 16–17, 30–32). By the end of the meeting, agreement had been reached on the basic terms of a contract. This was to be typed up for final approval and signature, subject only to minor corrections. Westbrook understood, however, that the agreement was to have the approval of the employees (R. 359–360; 49–50, 51). Opening with a prefatory paragraph stating that the agreement was "made and entered into the 10th day of August 1954," between the Company and the IAM, the basic agreement covers some 11 pages and consists of 22 articles of the type customarily included in collective bargaining agreements. Two of the articles, however, one entitled "WAGES" and the other "SENIORITY," specify that the provisions for each of these items shall be subsequently agreed upon and incorporated into the basic agreement as

Exhibit A and Exhibit B respectively (R. 349; 283–284, 289, 291).

Article I which is entitled "RECOGNITION" and is a part of the basic agreement, provides that the Company will recognize the IAM "as the sole and exclusive bargaining agency for all the employees within the bargaining unit" and that the "Company will bargain collectively with the Union with respect to rates of pay, wages, hours and other conditions pertaining to employment for all of the employees in the unit" (R. 350; 284). Article II of the basic agreement, entitled "CHECKOFF," provides that upon receipt of "a signed authorization of the employee involved," the Company shall deduct from his last paycheck each month "the initiation fee and dues payable by him" to the International during the period provided for in the authorization (R. 351; 284). Article III of the basic agreement, entitled "UNION SHOP" provides that, "As a condition of employment, all employees covered by this agreement shall, forty-five (45) days after the date of execution of this agreement, or in the case of new employees forty-five (45) days after the date of hiring, become members of the Union, and remain members in good standing in the Union, during the term of this agreement" (R. 351; 284–285). The basic agreement also provided that it "shall be in full force and effect from August 10, 1954 to August 10, 1956 and shall automatically remain in full force from year to year thereafter," in the absence of written notice of desire to amend or modify given not less than 60 days prior to the agreement's expiration date (R. 352; 296–297).

Further, no alteration, variation, waiver, or modification of the basic agreement is to be "binding upon the parties hereto unless such agreement is made and executed in writing between the parties hereto" (R. 351–352; 296–297).

After the August 10 meeting, Probst had the agreement typed, and mailed it to Westbrook who received it "around the 12th or 13th" of August (R. 359; 50). Vice-President Adams then signed it for the Company, and Schwartzmiller signed at a later date for the IAM under circumstances hereinafter described (R. 359; 16, 21, 23–24, 26, 36, 50–51, 60–61, 62).

3. *The IAM first appears at the Company's Reading plant on August 16, 1954, and a "Temporary Bargaining Committee" is formed to sign the wage supplement to the contract*

While for about a month prior thereto the United Auto Workers had been organizing employees at the Reading plant,[3] it was not until August 16, 1954, *i.e.*, after completion of negotiations of the aforementioned basic agreement and its execution by the Company, that the IAM made its first appearance at the plant. On this date, Union representative Schwartzmiller came to the plant, and had his first meeting with the "Temporary Bargaining Committee" which was made up of nine employees on the first shift and five employees on the second shift.[4] Membership on

[3] During the summer of 1954, employees had held several meetings on behalf of UAW at the home of an employee, and a number of UAW authorization cards had been signed (R. 362; 75–76, 95–96, 109–110, 258, 260).

[4] There were approximately 150 employees then working at the plant, some 100 of them working on the first shift and 50 on the second shift (R. 365; 187–188, G.C. Exh. 4).

this Committee was not based on any interest in the IAM. On the contrary, Plant Superintendent McFann selected the members at random, having gone through the time cards to try "to get a girl from each department" (R. 364–366, 368; 37–38, 149–150, 152–153, 207, 237). At least some of the members serving on the Committee had never before heard of the IAM at the plant (R. 368–369; 149–150, 152, 207).

The employees selected for the "Temporary Bargaining Committee" were given no advance notification thereof, but were simply called from their respective shifts on August 16, and told to report to Westbrook's office (R. 368; 37, 150–152). When the five employees representing the second shift reported, Westbrook introduced them to Schwartzmiller, and identified him as representing the IAM (R. 366; 150–151, 153). Schwartzmiller then explained to the group that the IAM had an agreement with the Company as of August 10 which would be to the employees' advantage (R. 366; 167–168, 208, 210–212). He mentioned their "getting a raise" and stated that there were parts of the agreement which "could be changed or altered in the future." Most of the remaining time was spent by him in reading parts of the contract (R. 366; 151–152, 212). Prior to the end of the meeting, which lasted approximately 45 minutes to an hour, Schwartzmiller passed out membership cards and told the group that as long as they were in there, they "might just as well be the first to sign the cards." All five employees then signed them (R. 366; 155–156, 208–209). Before dismissing the employees from the meeting, Schwartzmiller also

stated that there would be some papers for them to sign later in connection with the agreement (R. 366–367, 158).

Some thirteen employees testified that prior to August 16, 1954, when the "Temporary Bargaining Committee" met with IAM Representative Schwartzmiller, they had seen no IAM posters or circulars around the plant, they had never been asked to sign and had never signed any authorization or applications for membership, they had never been approached by anyone on behalf of IAM, and they had no knowledge of any discussions among employees at the plant relating to the IAM. The stipulated testimony of an additional 13 employees was to the effect that "the first time" they knew a union had come into the plant was on August 16, after Schwartzmiller's meeting with the second shift employees who had been chosen to serve on the "Temporary Bargaining Committee." Prior to that time, they too had never been approached by any representative of the IAM, or by any employee on its behalf, and had never seen any IAM posters, literature, or circulars (R. 362–365; 67–68, 69–70, 72–73, 79–80, 111–112, 123–124, 127, 135–136, 149–150, 200–202, 209, 231–232, 241–242, 245–246). After the meeting of the "Temporary Bargaining Committee," however, when members of the Committee returned to their jobs, word spread among the other employees about the purpose of the meeting (R. 366; 76–77, 128–129, 137–138, 200–201, 210–211, 241–242). Accordingly, when Plant Superintendent McFann appeared not long afterwards, "quite a few girls gathered around" and questioned him as to how the

selection of employees for the Committee had been made. McFann told them the Committee had been "chosen at random" (R. 366; 152–153, 157).

On Tuesday, August 17, the 14 employees forming the "Temporary Bargaining Committee" were again called into Westbrook's office, and this time signed Exhibit A to the contract, the wage supplement (R. 359–360; 40–41, 42, 158–160, 214–215, 216–218). Vice-President Adams and Schwartzmiller also signed the wage supplement (R. 359–360; 52–53).[5] Exhibit A provided for specified wage rates to be effective retroactively to August 10, with a 5 cents per hour increase for all employees, and a further 5-cent increase in December 1954. The wage rates were to remain in effect until August 10, 1955, when "hourly wage rates only" could be reopened upon 60 days written notice (R. 352–353; 299–300). The "Temporary Bargaining Committee" actually signed the contract at mid-afternoon on Tuesday, August 17, without prior vote of approval by Reading plant employees. Although the employees of the two shifts held mass meetings on that date, the meetings occurred after all signatures had been affixed to the basic agreement with its wage supplement (R. 359–360; 77–78, 81–82, 129–130, 143, 202, 221–223, 224–225, 227, 237–238, 252). Moreover, Schwartzmiller devoted both meetings simply to familiarizing the employees with the agreement that had been signed, and to electing committeemen from the respective shifts. No vote was taken at either of

[5] While Schwartzmiller also signed the basic agreement at this time, Adams, as noted *supra*, p. 7, had already signed this document on behalf of the Company.

the two meetings to approve the contract, or any of its provisions (R. 360–362; 71, 73–74, 81–82, 113–114, 129–130, 132, 139–140, 229, 230–231, 235, 237–240).

On August 18, committeemen elected from each of the shifts replaced members of the "Temporary Bargaining Committee," and negotiations commenced for the seniority provisions of the contract which, as noted *supra*, pp. 5–6, were to be included as Exhibit B. Agreement was reached on this phase of the contract on September 2, 1954, when Exhibit B was signed. The provisions on seniority thus constituted the only part of the 1954 agreement which committeemen elected by employees played any part in negotiating (R. 360–363; 24–25, 41–42, 118, 119–121, 248–255).

After the appearance of the IAM at the Reading plant on August 16, Schwartzmiller was confronted on a number of occasions with the question how the IAM had come into the plant. The first of these occasions occurred in the plant on the evening of August 16 when Schwartzmiller talked with Ruth Moses, an employee who had been interested in the UAW, and who had only shortly before learned of the IAM after the second-shift employees on the Temporary Bargaining Committee had returned from Westbrook's office. Schwartzmiller approached Moses at her machine, introduced himself as a representative of the IAM, and said that he understood Moses was not exactly pleased with the Union. Moses answered that "it was merely the way they had come in" which she questioned. Schwartzmiller explained that the IAM had been organizing another company interrelated

economically with Bryan, that "the company had agreed to let" the IAM come into the Reading plant, and that the IAM "came immediately, rather than try to organize in the usual way, because they figured they would come while the company was in the mood" (R. 371–373; 78–79, 85–87).

The second incident occurred on the afternoon of August 17, after the meeting of Schwartzmiller with the first shift employees. As Schwartzmiller was leaving the meeting hall, some officers of Local 701, UAW, introduced themselves and asked what was going on. Schwartzmiller told them that he had a contract with Bryan. In the ensuing discussion Schwartzmiller was asked if he did not know that the two unions had a "non-raiding agreement," and someone in the group accused him "of coming in the back door." Schwartzmiller neither denied nor confirmed the accusation, but when asked how he "got away with it," replied that it depended on whom you knew and that "if you can get away with it, you just get away with it." Schwartzmiller also told the group that he had just negotiated a contract with some other plant in Ohio (R. 372–374; 89–91, 93, 95–96, 98–99).

That night, during the meeting with employees from the second shift, Ruth Moses queried Schwartzmiller again, this time publicly, as to how the IAM had come into the plant and obtained a contract with the Company. Schwartzmiller made no claim that the employees had designated the IAM as their bargaining representative, but stated that he had been warned that an attempt would be made to break up

the meeting (R. 374; 69, 70–71, 80–81, 85, 114–115, 117–118, 130, 138–139, 202, 248).

Finally, at a meeting of the Executive Committee of the IAM Local Lodge during the summer of 1955, when there was still discussion among employees as to whether the IAM had properly come into the plant, Schwartzmiller explained that the IAM had been on strike at Essex Wire, a company in Lancaster, Ohio, that they had that company, which was "connected" with Bryan, "over a barrel," and that they had secured their contract at the Reading plant because "they told them that they would have to let them come in up here" (R. 375–379; 100–105).

B. THE AUGUST 30, 1955, AGREEMENT

During the summer of 1955, Schwartzmiller and Carl Cederquist, a Grand Lodge Representative of the IAM, initiated further negotiations with the Company by requesting a wage reopening under the wage supplement agreement of the 1954 contract, which provided that "hourly wage rates only" could be reopened on 60 days written notice given prior to August 10, 1955 (R. 391–392; 178–179, 299–300). Several bargaining conferences were held with the Company during the latter part of August 1955, in which Schwartzmiller and Cederquist participated, as well as representatives of the Local Lodge (R. 391–393; 172–181).

Schwartzmiller and Cederquist were also present at meetings of the Local Lodge held during the period of the negotiations (R. 391–392; 203–204). As a result of the bargaining sessions, a 3-year agreement

dated August 30, 1955, was entered into, and signed by 6 employees for the Local Lodge, as well as by Cederquist. Plant Manager McFann signed for the Company (R. 390–392; 43, 182–183).

The 1955 agreement, the initial term of which ran from August 10, 1955, to August 10, 1958, embraces the production and maintenance employees at the Reading plant, and also such employees at a second plant in Hillsdale, Michigan, which the Company acquired to relieve its overcrowded facilities at Reading (R. 392–394; 43, 45, 185–186).

The 1954 and 1955 contracts are substantially similar, and the articles providing for "Union Shop" and "Checkoff" in the 1955 agreement are identical with those in the 1954 agreement (R. 392–393; 283–286, 302–303). These provisions have been enforced under each of the contracts and every employee who has been with the Company 45 days or more has had his dues to the IAM checked off (R. 393–394; 195, 255).

In June and August 1955, charges were filed by an employee and served upon the Company and the IAM. The charges alleged in substance that enforcement of the union security provision of the agreement was violative of the Act (R. 263–266).

II. THE BOARD'S CONCLUSIONS OF LAW

The Board concluded, as had the Trial Examiner, that by compelling employees to join the IAM as a condition of employment, the Company had violated Section 8(a) (1), (2), and (3), and the IAM had violated Section 8(b) (1) and (2) of the Act (R. 411–

414,. 436–437). Rejecting the contention that the compulsion was not unlawful because it was conducted under the aegis of a union security contract permissible under Section 8(a)(3), the Board noted that such an agreement is valid only when negotiated with a union representing a majority of the employees. In this case the Board noted that the facts and circumstances surrounding the execution of the 1954 agreement established a *prima facie* case of lack of majority representation and that neither the Company nor the IAM came forward with any evidence whatsoever to refute that showing (R. 436–437).*

The Board, with two members dissenting, also rejected the contention that because the initial union-security agreement was executed over six months prior to the filing and service of charges, Section 10 (b) of the Act precluded the issuance of a complaint in the case (R. 432–433). In agreement with the Trial Examiner, the Board held that, while it was precluded by the Section 10(b) limitation from finding that the *execution* of the 1954 contract was an unfair labor practice, it was not so precluded with respect to its maintenance and enforcement, and the execution, maintenance and enforcement of the 1955 contract perpetuating such unlawful conduct, all within the six-month period preceding the filing of the charges (R. 432–435).

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* In a separate concurring opinion, Member Jenkins concluded that the union-security provision in Section 8(a)(3), being in the nature of an exception to the Act, placed the burden of proving compliance with its requirements, in the first instance, on the Company and the IAM (R. 443).

Noting that Section 10(b) is a statute of limitations and not a rule of evidence, the Board held that evidence of the unlawfulness of the 1954 contract at the time it was executed was admissible to show its continued invalidity, which does not end with its execution, but "continues so long as the unlawful contract remains in effect" (R. 432–433).

III. THE BOARD'S ORDER

The Board ordered the Company and the IAM to cease and desist from giving effect to their contract, and directed the Company to withhold recognition from the IAM, unless and until it was certified as the bargaining representative of the employees (R. 437–440). The Board further ordered the Company and the IAM to cease and desist from entering into, maintaining, or renewing their union security agreement, which failed to meet the requirements of Section 8(a)(3), and from in any like or related manner invading employee rights under Section 7 of the Act (*ibid.*). The Board also ordered both parties to stop giving effect to any checkoff cards, and jointly and severally to reimburse employees for any dues or initiation fees checked off pursuant to any agreement between the parties (R. 442).[7] Finally, the order directs both parties to post appropriate notices (R. 438–442, 457–461).

[7] The Company's liability for reimbursement of dues and initiation fees commences December 10, 1954 (six months prior to the service of the charge upon the Company), and the Union's liability commences February 8, 1955 (six months before service of the charge upon the Union) (R. 441–442, 260–266).

IV. THE HOLDING OF THE COURT BELOW

The court of appeals, with Judge Fahy dissenting, sustained the Board's order (R. 466–477). The court observed that, while the contract was executed outside the limitations period, its enforcement within the period by compelling employees to join the Union was an unfair labor practice cognizable by the Board, for the six-month proviso creates a period of limitations, not a rule of evidence. Noting that the compulsion of union membership was regularly repeated within the six-month period, the court held that the Board could properly consider events prior to the six-month period to determine whether conduct within that period was lawful. Finally, the court below sustained the Board's order directing the reimbursement of dues.

SUMMARY OF ARGUMENT

1. Section 10(b) provides a period of limitations governing past violations and extinguishes liability for unfair labor practices committed more than six months prior to the filing of charges. Section 10(b) enacts a statute of limitations and not a rule of evidence. Hence, while the statute extinguishes liability for past violations, it does not preclude the Board from taking cognizance of a condition, fact or event, which antedates the limitations period for the purpose of determining whether conduct within that period is violative of the Act.

The critical fact from which this controversy springs is that the IAM was not the bargaining representative of the employees when the union security agreement was executed. That fact has probative and

legal significance not only with respect to the execution of the agreement but also with respect to its enforcement for it renders both unlawful. The limitations which Section 10(b) imposes upon any Board inquiry into that fact turns upon the purpose of the inquiry and the use which is made of the fact. It cannot serve as the basis for charging petitioners with liability for having executed the illegal agreement. That unfair labor practice antedates the limitation period and Section 10(b) extinguishes liability for that illegal action. The statute does not, however, preclude the Board from taking cognizance of that fact for the purpose of determining liability for conduct within the statutory period, in this case, the enforcement of the agreement. There is no basis for differentiating this fact from any other probative or relevant evidence of which the Board may take cognizance. The statute does not limit the Board's use of relevant or probative evidence on the basis of its vintage; the sole bar which the statute interposes is that the Board may not find that conduct antedating the six-month period is an unfair labor practice.

The Board's finding that enforcement of the contract in the instant case constituted an unfair labor practice does not rest upon a subsidiary finding that its execution was also an unfair labor practice. It was unnecessary for the Board to make such a finding; nor are the sanctions of the Board's order directed to that past offense. To be sure, the IAM's lack of representative status also rendered the execution of the agreement an unfair labor practice which

could have been brought before the Board upon timely charges. But petitioners have not been found liable by the Board for that unfair labor practice. Their liability is predicated upon an unfair labor practice, enforcement of the agreement, within the limitations period. Hence, there is no infringement of the statutory prohibition against a complaint based upon any unfair labor practice antedating the limitations period.

The Board's construction of Section 10(b) does not do violence to the policy of repose inherent in a statute of limitations. The "wrong" in the instant case did not cease with the execution of the agreement. The continued enforcement of the agreement constituted a continuing invasion of the employees' statutory rights. And as to that, "the six months' limitation period had not even begun to operate" (*National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 722 (C.A. 2), affirmed 347 U.S. 17).

II. The Board's order directing petitioners to reimburse the employees for dues and fees checked off pursuant to the illegal contract is proper and valid. Such an order "should stand unless it can be shown that [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 539–540. Judged by this test, the Board's order against petitioners is lawful. The coercion exerted here upon the employees is indistinguishable from the illegal compulsion in *Virginia Electric* where this Court upheld a similar reimbursement order. No sig-

nificant distinction between the two cases exists because in *Virginia Electric* the union which was the beneficiary of the check-off provision was dominated by the employer. In terms of the propriety of the remedy, it makes little difference whether the employees' rights have been violated through an employer-dominated labor organization or through a union which they are compelled, by an illegal union security agreement, to join and support on pain of losing their jobs. In either case the employees have been deprived of their statutory freedom of choice. And in each case the refund order restores to the employees monies which, had it not been for the illegal arrangement, they would not have been required to pay.

ARGUMENT

I. SECTION 10(b) OF THE ACT DOES NOT PRECLUDE THE BOARD FROM FINDING THAT THE ENFORCEMENT OF A UNION SECURITY AGREEMENT WITHIN SIX MONTHS OF THE FILING OF THE CHARGES CONSTITUTES AN UNFAIR LABOR PRACTICE WHERE THE UNION DID NOT REPRESENT A MAJORITY OF THE EMPLOYEES WHEN IT ENTERED INTO THE AGREEMENT MORE THAN SIX MONTHS PRIOR TO THE FILING OF THE CHARGES

Section 7 of the Act guarantees to employees the right, *inter alia*, "to * * * join * * * labor organizations, to bargain collectively through representatives of their own choosing * * * and * * * the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)." Section 8 of the Act implements the protection of these rights against interference by em-

ployers or labor organizations. Sections 8(a) (1), (2) and (3) forbid an employer from interfering with, restraining or coercing employees in the exercise of their Section 7 rights; from contributing support to any labor organization; and from discriminating with respect to hire or tenure of employment to encourage or discourage membership in any labor organization. Sections 8(b) (1) and (2) of the Act enjoin labor organizations from restraining or coercing employees in the exercise of their Section 7 rights and from causing or attempting to cause an employer to discriminate against employees in violation of Section 8(a)(3).

The proscriptions thus addressed to employers and unions are subject to the qualification contained in the proviso to section 8(a)(3) that "nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made; * * *." Section 9(a), in turn, provides that "Representatives designated * * * by the majority of the employees * * * shall be the exclusive [collective bargaining] representatives".

Simply stated, the statute permits an employer and a union to require membership in the union as a con-

dition of employment only if there is in effect a valid union security agreement which satisfies the conditions prescribed by the statute. Where the agreement does not qualify under the statute, its *execution* and *enforcement* violate the Act; and each constitutes a separate and independent unfair labor practice. The execution of the agreement is illegal "because the existence of such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge if he defies the contract by refusing to become a member of the union." *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2). The application or enforcement of such an agreement constitutes an unfair labor practice because it effectuates the discrimination which is expressly forbidden except in accordance with the narrow terms of the proviso permitting union security agreements. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, 695; *National Labor Relations Board* v. *Gottfried Baking Co.*, 210 F. 2d 772, 779, 780 (C.A. 2); *National Labor Relations Board* v. *Wemyss*, 212 F. 2d 465, 471 (C.A. 9); *National Labor Relations Board* v. *Broderick Wood Products Co.*, 261 F. 2d 548, 556 (C.A. 10); *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 723 (C.A. 2), affirmed, 347 U.S. 17; *National Labor Relations Board* v. *United Hoisting Co.*, 198 F. 2d 465, 468–469 (C.A. 3), certiorari denied 344 U.S. 914; *National Labor Relations Board* v. *F. H. McGraw & Co.*, 206 F. 2d 635, 639 (C.A. 6), and cases there cited; *National Labor Relations Board* v. *Inter-*

national Brotherhood of Teamsters, 225 F. 2d 343, 346, 349 (C.A. 8); *National Labor Relations Board* v. *Shuck Construction Co.*, 243 F. 2d 519, 521 (C.A. 9).

In the instant case, the Board found, and petitioners concede, that the IAM did not represent a majority of the employees when the agreement was negotiated. Indeed, insofar as the record shows, the IAM did not then represent a single employee. Hence, the execution of that agreement and its subsequent enforcement constitute separate and independent unfair labor practices. The violation with which we are concerned here, however, is not the execution of the contract but its enforcement.

The central issue posed by this case is, therefore, the effect of the limitations period contained in Section 10(b) of the Act. That section provides that the Board may not issue a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *." The union security contract in the instant case was executed in August 1954 or more than six months prior to the filing of the charges in June and August 1955. Accordingly, under the statute the Board could, and did, not deal with the execution of the agreement as an independent unfair labor practice.

However, the parties to the agreement continued to enforce it within six months of the charge. The enforcement of the contract during that period thus constituted an unfair labor practice cognizable by the Board. Since the contract failed to meet the con-

ditions prescribed by the Act, it could not serve to sanction the otherwise illegal requirement of compulsory membership in the IAM. Accordingly, the issue here is whether under Section 10(b) the Board is precluded from dealing with the latter unfair labor practice merely because the disqualification of the parties to enforce the agreement must be established by reference to a fact which antedates the six-month period of limitations, namely, the IAM's lack of representative status when the agreement was made. We turn to that question.

1. Section 10(b) provides a period of limitations governing past violations and extinguishes liability for unfair labor practices committed prior to the six-month period. While the statute confers immunity for such past violations, neither its language nor legislative history suggests that it was also intended to preclude the Board from taking cognizance of a condition, fact, or event which antedates the six-month period for the purpose of determining whether conduct within that period is violative of the Act. As the Board has held (*Axelson Mfg. Co.*, 88 NLRB 761, 767):

> * * * Section 10(b) enacts a statute of limitations and not a rule of evidence. It forbids the issuance of complaints and, consequently, findings of violation of the statute in conduct not within the 6-months' period. But it does not * * * forbid the introduction of relevant evidence bearing on the issue as to whether a violation has occurred during the 6-months' period. Events obscure, ambiguous, or even meaningless when viewed in isolation, may, like the component parts of an equation, become clear,

> definitive and informative when considered in relation to other action. * * * Congress can scarcely have intended that the Board, in the performance of its duty to decide the validity of conduct within the six-months' period, should ignore reliable, probative and substantial evidence as to the meaning and nature of the conduct. Had such been the intent it seems reasonable to assume that it would have been stated.

This interpretation of Section 10(b) introduces no novel concept concerning the scope of statutes of limitations. The Court dealt with an analogous problem in *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683. There, the Commission found that the respondents had engaged since 1929 in unfair methods of competition and in a conspiracy to destroy price competition. In so finding, the Commission relied in part on respondents' activities prior to 1929 and on similar conduct subsequent to 1929, but during a period when such activities were lawful under the National Industrial Recovery Act. After noting that the Commission "did not make its findings of post-1929 combination, in whole or in part, on the premise that any of respondents' pre-1929 or NRA code activities were illegal", the Court stated, "The consideration given these activities by the Commission was well within the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transaction under scrutiny." *Id.* at 704–705. See also,

Standard Oil Co. v. *United States*, 221 U.S. 1, 46–47; *United States* v. *Reading Co.*, 253 U.S. 26, 43–44.*

Consistent with this established judicial rule, the courts of appeals have uniformly held that Section 10(b) does not preclude the Board from looking to events or circumstances antedating the six-month period for the purpose of determining whether conduct within the period constitutes an unfair labor practice violative of the statute. *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 443 (C.A. 3); *Paramount Cap Mfg. Corp.* v. *National Labor Relations Board*, 260 F. 2d 109, 113 (C.A. 8); *National Labor Relations Board* v. *General Shoe Co.*, 192 F. 2d 504, 507 (C.A. 6), certiorari denied, 343 U.S. 904; *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 791 (C.A. 7), certiorari denied, 340 U.S. 390.

2. Petitioners acknowledge (Br. 55–57) that the Board may look to circumstances or events which antedate the limitations period as "background evidence" for the purpose of assessing the legality of conduct within the statutory period. They contend, however, that this rule can have no application to a situation where the antecedent events constitute an unfair labor practice and are the exclusive foundation

* In the criminal law, although the applicable statute may bar prosecution for a crime committed beyond the limited period, it does not prevent the admission of evidence of acts occurring before the period, which prove a crime not barred by the statute, even if this same evidence also would have been probative of the offense outlawed by the statute. *Purviance* v. *State*, 185 Md. 189, 44 A. 2d 474–478; *People* v. *Cuevas*, 18 Cal. App. 2d 151, 63 P. 2d 311, 312.

for finding a violation within the period. The Board, so the argument runs, could not find that the enforcement of the agreement here during the limitations period was violative of the Act without also finding, as an indispensable predicate, that the execution of the agreement was an unfair labor practice and this it cannot do under Section 10(b).

The critical fact from which this controversy springs is that the IAM was not the bargaining representative of the employees when the union security agreement was executed. That fact has probative and legal significance not only with respect to the execution of the agreement but also with respect to its enforcement for it renders both unlawful. The limitations which Section 10(b) imposes upon any Board inquiry into that fact turns upon the purpose of the inquiry and the use which is made of the fact. It cannot serve as the basis for charging petitioners with liability for having executed the illegal contract. That unfair labor practice antedates the limitations period and Section 10(b) "extinguishes liability for unfair labor practices committed more than six months prior to the filing of the charge". *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301, 309, n. 9. But the statute does not preclude the Board from taking cognizance of that fact for the purpose of determining liability for conduct within the statutory period, in this case the enforcement of the agreement. There is no basis for differentiating this fact from any other probative or relevant evidence of which the Board may take cognizance. The statute does not limit the Board's use of probative or relevant

evidence on the basis of its vintage; the sole bar which the statute interposes is that the Board may not find that conduct antedating the six-month period is an unfair labor practice.

The Board's finding that enforcement of the contract in the instant case constituted an unfair labor practice does not rest upon a subsidiary finding that its execution was also an unfair labor practice. It was unnecessary for the Board to make such a finding; nor are the sanctions of the Board's order directed to that past offense. All that the Board has done is to look to the IAM's status when the agreement was executed to determine whether the statutory conditions for such agreements had been met. IAM's lack of representative status also rendered the execution of the agreement an unfair labor practice which could have been brought before the Board upon a timely charge, but petitioners have not been found liable by the Board for that unfair labor practice. Their liability is predicated upon the enforcement of the agreement within the limitations period. Hence, neither the complaint nor the Board's decision is "based upon any unfair labor practice[s]" which antedate the limitations period.

This distinction underlies the decision of the Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, affirmed, 347 U.S. 17. There the Board found that the enforcement of a union security agreement was violative of the Act because the union, when it entered into the agreement more than six months prior to the filing of the charge, had not been authorized by the employees

in a Board conducted election, as the statute then required, to enter into such an agreement. There, as here, the illegality of the union security agreement arose out of a condition prevailing when the agreement was executed. And in order to find the unfair labor practice within the limitations period, the Board had to look to a circumstance which antedated the six-month period, *i.e.*, the union's failure to obtain the necessary authorization to enter into such an agreement. This circumstance also rendered the execution of the agreement an unfair labor practice which the Board was precluded from dealing with by virtue of the limitations proviso. Rejecting the contention that Section 10(b) also barred the Board from finding that enforcement of the agreement within the limitations period was violative of the Act, the Second Circuit held that "so long as that contract continued in force, if actually illegal, a continuing offense was being committed by the employer. Since the contract was still in force at the time of filing [of the charge], the six-months' limitation period of § 10(b) had not even begun to operate." 197 F. 2d at 722.

This view of the limitations proviso was also adopted by the Court of Appeals for the Ninth Circuit in *Katz* v. *National Labor Relations Board,* 196 F. 2d 411. There the union, as in *Gaynor,* lacked the requisite authorization when it entered into a union security agreement more than six months prior to the filing of the charge. The Ninth Circuit held that "While * * * the mere execution of the agreement on

December 17, 1948, constituted an unfair labor practice, there is no doubt that the continuous enforcement of the agreement thereafter within the six-month period prior to the filing of the charge, was an unfair labor practice, and with respect to this continued and continuous enforcement of the illegal union shop agreement, the prosecution of the proceeding was not barred by limitations." 196 F. 2d at 415.[9]

The distinction also explains the decision of the Fifth Circuit in *American Federation of Grain Millers* v. *National Labor Relations Board,* 197 F. 2d 451, 454, on which petitioners rely, and serves to distinguish it from the instant case. There, a charge was filed alleging the discriminatory refusal to rehire a striker. The striker had been replaced by the employer and he was not entitled to reinstatement unless the strike had been caused or prolonged by the employer's unfair labor practices. It was alleged that the strike had been caused by the employer's illegal refusal to bargain with the employees' representative which had occurred more than six months prior to the filing of the charges. The striker's right to reinstatement therefore hinged upon a finding that the employer's antecedent refusal to bargain constituted an unfair labor practice. Hence, there, unlike here, the Board, to have found an unfair labor practice within the statutory period, would have had to make the

[9] Petitioners would distinguish these cases on the ground that the invalidity of the union security agreement was provable by a fact existing within the six-month period, namely, the lack of a certificate of authorization (Br. 67). This distinction, if such it be (see, *supra*, pp. 27-28), is not reflected in the rationale of these cases.

further finding that another unfair labor practice had been committed outside the six-month period. Observing this critical distinction, both the Board and the Fifth Circuit agreed that Section 10(b) foreclosed the Board from entertaining the striker's charge.[10] Cf. *National Labor Relations Board* v. *Textile Machine Works*, 214 F. 2d 929 (C.A. 3); *National Labor Relations Board* v. *Childs Co.*, 195 F. 2d 617 (C.A. 2); *National Labor Relations Board* v. *Pennwoven*, 194 F. 2d 521 (C.A. 3).

To further illustrate: Suppose, for example, that an employer on opening his plant announces that he will discharge any employee who joins a union. A year later an employee upon joining a union is discharged, and thereupon files a charge with the Board alleging that his dismissal is discriminatory. The employer's threat constitutes, of course, an unfair labor practice but in the absence of a timely charge, the Board cannot deal with it as such. However, even though the limitations provision precludes the issuance of a complaint based on that unfair labor practice, surely the Board may properly consider the threat as a probative fact bearing upon the legality of the discharge within the statutory period. Cf. *Paramount Cap Mfg. Co.* v. *National Labor Relations Board*, 260 F. 2d 109, 112–113 (C.A. 8).

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[10] But cf. *National Labor Relations Board* v. *Brown & Root, Inc.*, 203 F. 2d 139, where the Eighth Circuit rejected this view and held that Section 10(b) did not preclude the Board from looking to the employer's antecedent conduct for the purpose of determining whether or not striking employees were entitled to reinstatement, 203 F. 2d at 145–146.

The Board's position draws support from the decision of this Court in *Murphy* v. *Ramsey*, 114 U.S. 15. The case does not, of course, arise in the field of labor relations but the analysis which underlies the Court's ruling has significance here. There, election officials disqualified one Murphy from voting on the ground that he was a polygamist and therefore under the relevant statute not entitled to voting privileges. Murphy defended his right to vote on the ground that for more than three years prior to the passage of the statute he had not "entered into any marriage contract or relation with any woman" nor "cohabited with more than one woman"; that prosecution for any plural marriage which he may have contracted prior thereto was barred by statute after the lapse of three years; and that the disfranchisement constituted punishment for a past offense. Rejecting this contention, the Court declared (114 U.S. at 43):

> * * * The disfranchisement operates upon the existing state and condition of the person, and not upon a past offence. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or a polygamist, or is then actually cohabiting with more than one woman. Disfranchisement is not prescribed as a penalty for being guilty of the crime and offence of bigamy or polygamy; for, as has been said, that offence consists in the fact of unlawful marriage, and a prosecution against the offender is barred by the lapse of three years, by § 1044 of the Revised Statutes. Continuing to live in that

state afterwards is not an offence, although cohabitation with more than one woman is. But as one may be living in a bigamous or polygamous state without cohabitation with more than one woman, he is in that sense a bigamist or a polygamist, and yet guilty of no criminal offence. So that, in respect to those disqualifications of a voter under the act of March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecution for crime.

3. Petitioners urge (Br. 33–35) that to permit an inquiry into the inception of the bargaining relationship here which antedates the statutory period does violence to the policy of repose inherent in a statute of limitations. Petitioners misapply this policy. In the conventional situation involving a limitations statute a wrong has been committed; whatever invasion of legally protected interests has occurred is final and complete when the offense is committed. The policy of repose reflected in a statute of limitations requires the injured party to take timely action for the redress of the consummated wrong; absent such timely action he is thereafter barred from seeking relief for that past wrong. In the instant case an unfair labor practice was committed when petitioners executed the union security agreement. But the agreement, once it had been executed, did not have a mere passive existence. The parties thereafter continued to enforce it within the six-month period. The "wrong" did not cease with the execution of the agreement for which liability was cut off after the six-

month period; the continued enforcement of the agreement constituted a continuing invasion of the employees' statutory rights. And as to that, "the six months' limitation period * * * had not even begun to operate." *Gaynor, supra,* p. 29. As the court below observed (R. 475; see also R. 470, 472, 473), "The dispute here involved is not the kind which buries easily but rankles at least once a month in the mind of those offended by being forced, as they see it, to pay tribute to an organization they had no really free choice in joining."

The decision of the Eighth Circuit in *National Labor Relations Board* v. *International Brotherhood of Teamsters,* 225 F. 2d 343, throws a beacon of light here. In that case the employer and the union, under an illegal arrangement giving the union authority to settle all seniority questions, adopted a seniority list which discriminated in favor of employees who had promptly joined the union upon their employment and against those who had joined at a later date. The disfavored employees were not pecuniarily affected by the seniority list until after more than six months after the list was adopted and thereupon they filed charges alleging unlawful discrimination. The court, rejecting the argument that under Section 10(b) the Board was precluded from entertaining the charge, said, 225 F. 2d at 346:

> * * * We agree with the position of the Board * * * that, when the union and the employer failed to take steps to correct their unlawful action, but chose instead to make subsequent specific use or application of the improper

seniority list to subject the five employees to a direct personal loss in work opportunity, they engaged in an additional step of legal wrong, having a produced consequence and a union-joining compulsion extending beyond the mere passive existence of the improper seniority list, and that they thereby were guilty of committing such a discrimination as remedially entitled a charge to be filed with the Board within a six-months period after the work deprivation had occurred.

Equally insubstantial, we think, is petitioners' related claim (Br. 31–34) that the Board's interpretation of Section 10(b) ignores the declared legislative purpose of protecting a respondent against liability for an unfair labor practice "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H. Rep. No. 245, 80th Cong., 1st Sess., p. 40; 1 Leg. Hist. of the Labor-Management Relations Act, 1947, 331. Under that interpretation, petitioners assert, an employer and a union could be held liable under the last of a series of union security agreements, the first of which may have been executed many years before under circumstances no longer clear. Obviously that is not this case, for petitioners have never made an issue of the fact that the IAM did not represent a majority of the employees when they entered into the union security agreement. The argument, moreover, confuses the distinction between statutes of limitations which preclude liability for past conduct and rules governing the weight to be given evidence. Where the claim of lack of majority depends upon facts of ancient vintage, it may be that

the evidence will be of insufficient probative force. But this goes to the weight of the evidence rather than to admissibility. As stated in *Purviance* v. *State*, 185 Md. 189, 44 A. 2d 474, at 478:

> * * * While the trial court may, and in some instances should, reject evidence which, although relevant or deemed to be relevant, appears too remote to be material, yet of course there are many instances in which particular evidence has been held not inadmissible on this ground; and ordinarily remoteness affects the weight, rather than the admissibility, of evidence. The question of excluding evidence because of remoteness rests largely in the sound discretion of the trial judge.

4. The support which petitioners seek to derive from certain appropriations riders for their interpretation of Section 10(b) is illusory. It is evident that the riders had far broader sweep than Section 10(b). In the riders, Congress, in comprehensive language, accorded the broadest kind of immunity to a labor agreement once it had been in effect for a stated period notwithstanding any illegality which may have attached to the agreement. Section 10(b), on the other hand, has no such far-reaching purpose. As this Court has noted, the Section was designed merely to extinguish liability for unfair labor practices committed more than six months prior to the filing of charges. *Fant Milling, supra*, p. 27. This is far from saying, as the riders did, that once a contract had been in effect for six months without the filing of a charge, that no liability could be predicated upon the enforcement of that agreement within the limitations period.

The difference between the riders and Section 10(b) and the irrelevance of the former for purposes of construing the latter may be demonstrated by an additional consideration. Petitioners concede (Br. 39) that where a union shop agreement is invalid on its face, the Section 10(b) limitations period is inapplicable. Under the appropriations riders, however, such an agreement would have been immune to attack once the stated period had elapsed without a complaint having been filed.

To be sure, the Senate Committee reporting Section 10(b) stated that it rendered the appropriations rider unnecessary. S. Rep. No. 105, 80th Cong., 1st Sess. p. 26; 1 Leg. Hist. of the Labor-Management Relations Act, 1947, 432. But this does not necessarily imply that Section 10(b) was intended to be, insofar as labor agreements were concerned, coextensive with the broad reach of the riders. All that can be attributed to the Senate Report statement is that Section 10(b) dealt with the question of liability for past unfair labor practices generally and there was no longer any need for such specialized legislation as the rider. In these circumstances, we cannot look to the riders for the purpose of interpreting Section 10(b).

5. Finally, if Section 10(b) is susceptible to differing interpretations, we believe that important policy considerations tip the scales in favor of the Board's interpretation. As we have noted, the Act assures to employees the right to join, assist and bargain collectively through representatives of their own choice. It also accords to them the right to refrain from any or all such activities. These correlative rights are the most fundamental guaranty of the

statute; all others are incidental to it. The only qualification upon the exercise of this right is contained in the proviso to Section 8(a)(3) which permits union security agreements conditioning employment upon union membership. But an indispensable condition for such a limitation upon the employees' statutory rights is that the union, party to such an agreement, be the freely chosen representative of the employees. The contract in this case failed to satisfy that condition and as a consequence the employees have been compelled continuously to join and support a union which could not lawfully require them to do either. A construction of Section 10(b) which would cut off liability for this continuing abrogation of the employees' statutory rights "is to be avoided unless the words Congress has chosen clearly compel it." *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 289. As this Court observed in *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 287, "Moreover, in the face of the affirmative emphasis that is placed by the Act upon freedom of concerted action and freedom of choice of representatives," any limitation upon the employees' rights "must be more explicit and clear than it is here in order to restrict them at the very time they may be most needed."

Practical considerations, aptly illustrated by the instant case, lend additional support to the Board's reading of the limitations proviso. As noted above, an air of uncertainty prevailed among the employees as to how the IAM "got in" when they learned of the union security agreement. Their inquiries met eva-

sive replies and accusations of being trouble makers (R. 8–81, 82, 87, 119, 130, 202). Indeed, a year after the contract was executed, the employees continued to wonder how the IAM had managed to obtain the agreement (R. 100, 105, 375–379). It is not an easy matter for employees, especially in a plant of any size, to ascertain whether a majority of the employees have signed membership or authorization cards in favor of a particular union. Because such proof may not be readily available, an employee may well hesitate to risk possible reprisals for filing charges attacking the contract until he is sure of his ground. The result is, of course, that charges may not be filed until more than six months after the contract has been executed. The difficulties are even greater in the case of employees who are hired after the agreement has been executed and been in force for a period of time. If Section 10(b) precludes the filing of charges attacking the enforcement of the illegal contract within the statutory period, important statutory rights are lost through no fault of the employees.

II. THE BOARD'S ORDER DIRECTING THE COMPANY AND THE IAM TO REIMBURSE THE EMPLOYEES FOR INITIATION FEES AND DUES CHECKED OFF PURSUANT TO THE ILLEGAL CONTRACT IS PROPER AND VALID

The Board's order directs the Company and the IAM jointly and severally to reimburse the employees for initiation fees and dues checked off pursuant to the contract.[11] As we have shown, the contract unlaw-

[11] As stated above, p. 16, the liability in this respect is limited to the period beginning six months prior to the service of the charges upon the Company and the Union, respectively.

fully required the Company's employees to become members of the IAM and to pay dues and initiation fees as the price of continued employment. The Company collected these sums by means of the checkoff. Plant Manager McFann testified that subsequent to the execution of the August 1954 contract "all the employees authorized the checkoff sheet except possibly a few on probation" and that no employee who had been employed 45 days or longer had ever refused to have his dues checked off (R. 255).

Petitioners do not question the Board's power to prescribe such a reimbursement order. They challenge the order here as an abuse of the Board's discretion. The considerations which have prompted the Board to adopt this remedy were explicated by the Board in *United Association of Journeymen & Apprentices of Plumbing & Pipefitting Industry*, 115 NLRB 594. Although in that case the illegal hiring agreement provided for a closed shop, the Board's reasoning is fully applicable here. The Board said, at pp. 600–601:

> * * * the Taft-Hartley amendments have made unlawful all closed-shop contracts as contrary to public policy, proscribing such conduct by unions as unfair labor practices. The dues required and collected under such a contract, and all assessments under any contract, contravene that public policy. It is no longer required by the Act that the union be company-dominated in order for collection of dues to be unlawful under a closed-shop contract. Here, the dues and the assessments were required and collected pursuant to a contract which clearly contra-

vened the public policy of the Act. Dues and assessments here collected constituted the price these employees paid in order to retain their jobs. We therefore conclude that the remedy of reimbursement of all such monies is appropriate and necessary to expunge the illegal effects of the unfair labor practices found here.

Frequently, since enactment of the Taft-Hartley amendments, this Board has ordered unions to reimburse members for dues, excessive initiation fees, or the monies unlawfully exacted as the price of employment, even in the absence of an employer-party to the proceeding and in the absence of any findings of Section 8(a)(2) violations.

It is our view that, where payment of dues is required under a closed-shop contract, as where assessments are required under an otherwise valid agreement, reimbursement of such monies actually collected will best effectuate the policies of the Act. Otherwise the very fruits of the unfair labor practice itself will remain in the hands of the respondent. [Footnotes omitted.]

The decision of the Court in *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U.S. 533, is, in our view, dispositive of petitioners' attack upon the remedy adopted by the Board here. In that case the Court approved the Board's order which directed the refund of dues and fees paid by the employees pursuant to an agreement between the employer and a union dominated by the former that provided for a closed shop and a checkoff of dues. Such a directive, the Court declared, "should stand unless it can be shown the order is a patent attempt

to achieve ends other than those which can fairly be said to effectuate the policies of the Act." 319 U.S. at 539–540. Judged by this test, the Board's order against petitioners is entitled to stand. For just as no such showing was made in *Virginia Electric*, so none can be made in the instant case.

As we have noted, the union security agreement here, in flagrant disregard of the Act, has required the employees willy-nilly to join and support a union which could not lawfully require them to do either. The coercion thus exerted here is indistinguishable from the illegal compulsion in *Virginia Electric*. As in that case, we submit, the Board may "expunge the effects of the unfair labor practices by ordering the reimbursement of checked-off dues." *Virginia Electric*, 319 U.S. at 541. In both situations the order "returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company [and Union] whose unfair labor practices brought about the situation." *Ibid.* Accord: *National Labor Relations Board* v. *Local 404*, 205 F. 2d 99, 104 (C.A. 1); *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 57–58 (C.A. 4), certiorari denied, 321 U.S. 795; *Dixie Bedding Manufacturing Co.* v. *National Labor Relations Board*, 268 F. 2d 901 (C.A. 5); *National Labor Relations Board* v. *Parker Bros.*, 209 F. 2d 278, 280 (C.A. 5); *National Labor Relations Board* v. *Broderick Wood Products Co.*, 261 F. 2d 548, 558–559 (C.A. 10).

Petitioners assert, however (Br. 83–85), that *Virginia Electric* is inapposite for there, unlike here, the

union which was the beneficiary of the check-off provision was dominated by the employer. But this circumstance supplies no meaningful distinction. For it would seem to make little difference, in terms of the propriety of the remedy, whether the employees have been victimized through an employer-dominated labor organization or through a union which they are compelled to join and support on pain of losing their jobs by virtue of an illegal union security agreement. In either case the employees have been deprived of their statutory freedom of choice. And in each case the refund order restores to the employees monies which, absent the illegal arrangement, they could not have been required to pay.

Nor is the propriety of the Board's order lessened, as petitioners suggest (Br. 74–80), by the circumstance that the employees may have derived adequate compensatory benefits from union representation. The speculative nature of these claims, even if they were of significance, hardly needs to be emphasized. It may be that the IAM obtained benefits for the employees; but "' it is manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with.'" *Virginia Electric, supra,* at 544. And, it may be added, even if the employees here received an adequate *quid pro quo,* this is not always the case. Collusive union security agreements have been known to serve as devices for mulcting unwilling employees with little or no benefit to them. Cf. *Dixie Bedding Manufacturing Co.* v. *National Labor*

Relations Board, 268 F. 2d 901 (C.A. 5).[12] Moreover, it is evident that the argument, carried to its logical conclusion, would for all practical purposes deny to the Board the only effective sanction against collusive illegal union security arrangements. In any event, as this Court observed in *Virginia Electric*, 319 U.S. at 543:

> * * * It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge. The Board has here determined that the employees suffered a definite loss in the amount of dues deducted from their wages and that the effectuation of the policies of the Act requires reimbursement of those dues in full. We cannot say that this considered judgment does not effectuate the statutory purposes.

Equally unpersuasive is the ancillary argument (Br. 77) that there is no reason to suppose that the employees who entered the Company's employment after the execution of the agreement did not willingly embrace the situation which they found. What is significant is that, in the absence of a valid union security agreement, these employees were entitled to be free of any obligation to join or support the IAM. Whether or not they may have willingly embraced

[12] See Second Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 621, 86th Cong., 1st Sess., pp. 302-309.

that obligation, the point is that they had no choice in the matter. And the statute guarantees to them the right to say "No," except only where there is in effect a lawful union security agreement. Without that right, the statutory freedom of choice is illusory and the impairment of that freedom is not redressed by the assertion that they would have joined in any event. Moreover, it is not enough to suggest that some employees might have done so. The burden would rest upon "the tortfeasor to disentangle the consequences" by showing that, had there been no contract, dues and fees would nevertheless have been paid. This petitioners are unable to do. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2), certiorari denied, 304 U.S. 576.[13]

Petitioners seeks to buttress their argument with the contention (Br. 82) that the dues were checked off pursuant to the employees' individual voluntary authorization and, hence, the element of coercion could have played no part in the payment of dues and fees. But plainly it is immaterial whether the employee pays his dues and fees directly to the union or resorts to the convenience of a check-off whereby the employer deducts the fees and dues from his pay and

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[13] Accord: *National Labor Relations Board* v. *Swinerton*, 202 F. 2d 511, 515–516 (C.A. 9), certiorari denied, 346 U.S. 814; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C.A. 3). Nor would there be any "reason for" petitioners to "go scot-free because * * * [they] chose a method which leaves the victims unidentifiable" and possibly "some who could not have been injured are sharing with those who were." *Woolworth Co.* v. *National Labor Relations Board*, 121 F. 2d 658, 663 (C.A. 2).

transmits them to the union. The use of this device does not make the payment any the less compulsory.[14] Nor is the coercion imposed upon the employees lessened by the suggestion (Br. 79) that the employees could have sought relief by filing a de-authorization petition calling for an election to test the IAM's representative status. Where the employees have been compelled to accept union membership and its costs, the employer and the union can hardly claim immunity for this wrongdoing merely because the coerced employees prefer not to expose themselves by filing an anti-union petition.

Finally, petitioners argue (Br. 80–81) that the reimbursement order visits a penalty not only upon the Company, which merely served as a conduit for transmitting the money, but also upon the membership of the IAM, to whose dues and fees the Union must look to satisfy the reimbursement order. The employer in *Virginia Electric* also acted as a conduit for the transfer of dues and fees to the union which was the beneficiary of the illegal checkoff. But this circumstance was of no avail, for, as the Court stated, the order properly "places the burden upon the Company whose unfair labor practices brought about the situation." 319 U.S. at 541. Further, it is no idle surmise that in that case the reimbursement order was

[14] Petitioners' argument that the Board's order itself somehow exposes the weakness of the Board's case because it directs the refund of only dues and fees checked off and does not speak of dues paid directly is simply not addressed to the facts of this case. As stated above, pp. 14, 40, all of the employees submitted to the check-off and there was no reason for the Board to deal with dues paid directly.

undoubtedly satisfied at the expense of innocent stockholders of the company, for the dues and fees collected by the company did not remain in its treasury.

Petitioners intimate that the reimbursement order is a recent innovation of the Board and for that reason is somehow vulnerable. Even if an order which is not essentially different than that approved by the Court in 1943 in *Virginia Electric* can be thought to be novel, the novelty of a Board order is scarcely an argument against it. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. This process necessarily permits change and innovation with a view to effectuating the purposes of the Act. Nor, finally, is it profitable to engage in discussion, as we are invited to, concerning the Board's extension of the reimbursement remedy to situations not now before the Court. As the Court has observed, "We decide only the case before us * * *." *Virginia Electric, supra,* 319 U.S. at 545.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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OCTOBER 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *
>
> (3) [as amended, 65 Stat. 601] by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section

8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h) * * *

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said

complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE 1939

SUPREME COURT OF THE UNITED STATES

No. 44.—October Term, 1959.

Local Lodge No. 1424, etc., et al., Petitioners, v. National Labor Relations Board.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April 25, 1960.]

Mr. Justice Harlan delivered the opinion of the Court.

The question we decide in this case is whether an unfair labor practice complaint, whose charges against these petitioners were sustained by the National Labor Relations Board, was barred by the six-month statute of limitations contained in § 10 (b) of the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. § 160 (b). That section reads in pertinent part:

> "*Provided* . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . ."

On August 10, 1954, petitioners Bryan Manufacturing Company and the International Association of Machinists, AFL, entered into a collective bargaining agreement for a unit of Bryan's employees. The agreement, as later supplemented in certain respects not material to this litigation, contained the conventional provisions, of which two are relevant here: the "recognition" clause, by which the Union was recognized as "the sole and exclusive bargaining agency for all employees" in the unit; and the "union security" clause, by which all employees were

required, subject to a 45-day grace period, to become and remain members of the Union. On August 30, 1955, a new agreement was entered into, with Bryan, the Union, and petitioner Local Lodge No. 1424, IAM, as signatories, replacing the old agreement and applying additionally to employees at a newly opened plant as well as to those covered by the original agreement.

When the original agreement was executed on August 10, 1954, the Unions did not represent a majority of the employees covered by it.[1] Under §§ 7 and 8 of the Act[2]

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[1] It was so found by the Board, and petitioners have not challenged that finding.

[2] Section 7 (61 Stat. 140, 29 U. S. C. § 157) provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 8 (61 Stat. 140, as amended, 29 U. S. C. § 158) provides:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . . if such labor organization is the representative of the employees as provided

the Board has evolved the principle, not drawn in question here, that it is an unfair labor practice for an employer and a labor organization to enter into a collective bargaining agreement which contains a union security clause, if at the time of original execution the union does not represent a majority of the employees in the unit.[3] The maintaining of such an agreement in force is a continuing violation of the Act, and the "majority status" of the union at any subsequent date—including the date of execution of any renewals of the original agreement—is immaterial, for it is presumed that subsequent acquisition of a majority status is attributable to the earlier unlawful assistance received from the original agreement.[4]

In June and August 1955, 10 months and 12 months after the execution of the original agreement, charges were filed with the Board and served upon the petitioners,

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in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . ."

[3] The same doctrine is applied to an agreement containing only a "recognition" clause making a union the exclusive bargaining agent for all employees in the unit covered by the agreement. See *Bernhard-Altmann Texas Co.*, 122 N. L. R. B. — (No. 142); *Charles W. Carter Co.*, 115 N. L. R. B. 251, 262; *International Metal Products Co.*, 104 N. L. R. B. 1076; *John B. Shriver Co.*, 103 N. L. R. B. 23, 38; and see the Trial Examiner's discussion in the present case, 119 N. L. R. B. 502, 555, n. 98. The agreement now in question contained both a union security and a recognition clause, but for convenience we shall deal with the matter in terms of the union security clause alone.

[4] See 119 N. L. R. B., at 546, 548.

alleging the Unions' lack of majority status at the time of execution and the consequent illegality of the continued enforcement of the agreement. Complaints were thereafter issued by the Board's General Counsel against the Unions and the Company. Petitioners contended before the Board that the complaints were barred by the limitations proviso of § 10 (b), set forth above. The Board, two members dissenting, held that the complaint was not barred by limitations, 119 N. L. R. B. 502, and the Court of Appeals affirmed, one judge dissenting. 264 F. 2d 575. We granted certiorari, 360 U. S. 916, because of the importance of the question in the proper administration of the National Labor Relations Act. For reasons given in this opinion we hold that the complaints against these petitioners are barred by time.[3]

We first note the opposing contentions of the parties. The Board starts with the premise that a collective bargaining agreement which contains a union security clause valid on its face, but which was entered into when the Union did not have a majority status, gives rise to two independent unfair labor practices, one being the execution of the agreement, the other arising from its continued enforcement. Conceding that a complaint predicated on the *execution* of the agreement here challenged was barred by limitations, the Board contends that its complaint was nonetheless timely since it was "based upon" the parties' continued *enforcement*, within the period of limitations, of the union security clause. It is then said that even though the former was itself time-barred, the unlawful execution of the agreement was nevertheless "relevant in determining whether conduct within the 6-month period was unlawful," 119 N. L. R. B.,

[3] The petition for certiorari also raised an issue as to the propriety of the relief ordered by the Board. Because of our view of the case it becomes unnecessary to reach that question.

at 504; evidence as to it was admissible because § 10 (b) is a statute of limitations, and not a rule of evidence.

On the other hand, petitioners contend that, standing alone, the union security clause and its enforcement were wholly innocent; that they were tainted only by virtue of the original unlawful execution of the agreement; and that since a complaint based upon that unfair labor practice was barred by limitations, that event itself could not be utilized to infuse with illegality the otherwise legal union security clause or its enforcement. They say, in short, that to apply in this situation the doctrine that § 10 (b) is a statute of limitations, and not a rule of evidence, is to circumvent the purposes of the section, and that acceptance of the Board's position would mean that the statute of limitations would never run in a case of this kind. We think petitioners' position represents the correct view of the matter.

It is doubtless true that § 10 (b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10 (b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10 (b) ordinarily does not bar such evidentiary use of anterior events.[8] The second situation is that where con-

[8] The most frequently cited Board expression of this principle is that found in *Axelson Mfg. Co.*, 88 N. L. R. B. 761, 766:

"As I interpret the statute however, Section 10 (b) enacts a statute of limitations and not a rule of evidence. It forbids the issuance of complaints and, consequently, findings of violation of the statute

duct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign.[7] The

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in conduct not within the 6 months' period. But it does not, as I construe it, forbid the introduction of relevant evidence bearing on the issue as to whether a violation has occurred during the 6 months' period. Events obscure, ambiguous, or even meaningless when viewed in isolation may, like the component parts of an equation, become clear, definitive, and informative when considered in relation to other action. Conduct, like language, takes its meaning from the circumstances in which it occurs. Congress can scarcely have intended that the Board, in the performance of its duty to decide the validity of conduct within the 6 months' period, should ignore reliable, probative, and substantial evidence as to the meaning and the nature of the conduct. Had such been the intent, it seems reasonable to assume that it would have been stated."

The Board, however, has developed certain limits on the applicability of this principle. See p. —, *post*, and note 13.

[7] It was the view of one member of the Board majority that a presumption of illegality should attend the enforcement of a union security clause, so that sufficient proof of violation results merely from a showing that such a clause is operative, thus putting on the parties to the agreement the burden to defend by proving compliance with the requirements of the proviso to § 8 (a) (3) of the Act, 61 Stat. 140, as amended, 29 U. S. C. § 158 (a) (3), see note 2, *ante*, including

Trial Examiner, whose findings were adopted by the Board, observed:

> "The General Counsel concedes that the 6-month limitation of Section 10 (b) of the Act precludes currently finding the *execution* [8] of the 1954 agreement to be an unfair labor practice, and also precludes currently finding its *enforcement* to be an unfair labor practice . . . at any time prior to the . . . periods . . . beginning 6 months prior to the . . . charges. . . . However, this concession in no way detracts from the crucial nature of the earlier events

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majority status at the time of execution. 119 N. L. R. B., at 510. While acceptance of this view would concededly support the result reached below, it was not adopted by the Board, as the concurring member acknowledged. *Id.*, at 511. We too reject it. It rests on the mistaken judgment that the proviso to § 8 (a) (3) permits the inclusion of union security provisions "in derogation of the rights guaranteed employees in the definitive statement of national policy contained in Section 7," *id.*, at 510, and on the principle that, exoneration of certain types of union security clauses having been granted in a proviso, the burden of proving the proviso's applicability rests on him asserting it. The latter principle need not detain us; insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments. As to the argument drawn from § 7, it would be enough to note that that very provision is in terms limited by the scope of the § 8 (a) (3) proviso. (See note 2, *ante*.) More to the heart of the matter, it is the entire Act, and not merely one portion of it, which embodies "the definitive statement of national policy." It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8 (a) (3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly.

[8] Emphasis here by the Trial Examiner.

> because at the core of the General Counsel's contentions as to all of the unfair labor practices is his fudamental position that, *because of the circumstances prevailing when made,* the original union-security agreement of 1954 has never been valid or legal, since it has never met certain overriding requirements of Section 8 (a)(3) of the Act." 119 N. L. R. B., at 530. (Emphasis added, except as indicated.) [9]

Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10 (b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40,[10] and of course to stabilize existing bargaining relationships.

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[9] These observations were accepted both by the Board and the Court of Appeals. 119 N. L. R. B., at 503–504; 264 F. 2d, at 579. See also *Lively Photos, Inc.*, 123 N. L. R. B. — (No. 126).

[10] The Examiner's Report shows the pertinency of this statutory purpose in the present case. In his analysis of the evidence, he observed:

> "It is evident that with many witnesses testifying as to numerous different matters, it would protract this report greatly to summarize all of the testimony, or to spell out fully the confusion and inconsistencies therein, much of which is not too surprising, in view of the fact that, with respect to the events of August 1954 [the events

Our view of the matter is lent support by the attitude of the Board itself, whose previous decisions, albeit not always with unanimity among its members or even perhaps with perfect consistency, have recognized that evidentiary rules as to past events must be regarded differently in the two situations we have already depicted. Compare, *e. g., Potlatch Forests, Inc.*, 87 N. L. R. B. 1193, where evidence as to events during the barred period was used to illuminate current conduct claimed in itself to be an unfair labor practice,[11] with *Bowen Products Corp.*, 113 N. L. R. B. 731, and *Greenville Cotton Oil Co.*, 92 N. L. R. B. 1033, aff'd *sub nom. American Federation of Grain Millers, A. F. L.* v. *Labor Board*, 197 F. 2d 451, where the gravamen of the unfair labor practice complained of lay in a fact or event occurring during the barred period.[12]

"at the core" of the allegations of illegality], there had been a lapse of almost 15 months before testimony was given in November 1955." 119 N. L. R. B., at 529.

[11] In that case, in explaining his consideration of "relevant evidence" antedating the six-month period, the Trial Examiner, whose report was confirmed by the Board, said: "The Respondent's earlier conduct has been considered here merely for the purpose of bringing into clearer focus the conduct in issue. Even without such consideration, however, the allegations of discrimination would have been found amply supported by such undisputed record facts as bear directly upon the layoffs of [the employees involved within the six-month period]." 87 N. L. R. B., at 1211. See also *Local 1418, International Longshoremen's Assn.*, 102 N. L. R. B. 720, 729–730, relied on by the Board, and *Labor Board* v. *General Shoe Corp.*, 192 F. 2d 504; *Labor Board* v. *Clausen*, 188 F. 2d 439; and *Superior Engraving Co.* v. *Labor Board*, 183 F. 2d 783, cited by a dissenting opinion here.

[12] In *Bowen Products* an employee recalled from layoff was discriminatorily placed at the bottom of the relevant seniority list. He unsuccessfully attempted to obtain his proper seniority rating, and several months later was included in an economic reduction in force. Had his seniority originally been properly computed, he would not have been laid off at that time. The charge was filed and served

Indeed, some Board cases have gone even further and held § 10 (b) a bar in circumstances when, although none of the material elements of the charge in a timely complaint need necessarily be proved through reference to the barred period—so that utilization of evidence from that period is ostensibly only for the purpose of giving color to what is involved in the complaint—yet the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations in the complaint is shown largely by reliance on the earlier events. See, *e. g., News Printing Co., Inc.*, 116 N. L. R. B. 210, 212; *Universal Oil Products Co.*, 108 N. L. R. B. 68; *Tennessee Knitting Mills, Inc.*, 88 N. L. R. B. 1103.[13]

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within six months of the layoff, but more than six months after the original determination of seniority status. Finding that the only basis for a holding of unlawful layoff would be a finding that that determination had been a violation of the Act, the Board dismissed the complaint.

Greenville Cotton Oil (American Federation of Grain Millers) dealt with an alleged discriminatory refusal to reinstate strikers. Conceding that the respondent had engaged permanent replacements, the strikers demanded reinstatement on the ground that the strike had been caused or prolonged by an unfair labor practice committed by the employer prior to the hiring of the replacements. The acts alleged to have constituted such unfair practices having taken place more than six months prior to the filing and service of the charge, the Board held § 10 (b) a bar to an order of reinstatement.

[13] The complaint in *News Printing Co., Inc.*, alleged that a refusal to grant wage increases to certain employees had been motivated by displeasure at their union activities. As a substantive matter, this allegation turned on the respondent's motive at the time of the refusal, which was within the limitations period. However, the General Counsel was unable to produce sufficient evidence, from within that period, to prove discriminatory motive, and the Board refused to permit reliance on evidence relating to acts occurring prior to the six-month period. The contention that such earlier acts could be referred to in order to justify the inference that the "pattern of unlawful conduct . . . continued on into the present situation" was

However, we express no view on the problem raised by such cases, for here we need not go beyond saying that a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10 (b) proviso.[14]

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rejected. 116 N. L. R. B., at 211. Compare *Paramount Cap Mfg. Co.*, 119 N. L. R. B. 785, 786, 799, enforcement granted, 260 F. 2d 109, where the presence of substantial post-limitations evidence was held to justify resort to evidence of earlier conduct.

The *Universal Oil Products* and *Tennessee Knitting Mills* cases concerned allegations that respondent employers had dominated or assisted labor organizations. Here again, the material issue was as to the relationship of the respondents to the unions involved, as of the date of the charge. Yet in both cases, because the evidence from within the statutory period was too sketchy to warrant a finding of unlawful conduct, the Board refused to permit reference to evidence from the earlier period, declining to rely on an inference that earlier unlawful relationships continued.

While it is true that in *Paint, Varnish & Lacquer Makers Union (Andrew Brown Co.)*, 120 N. L. R. B. 1425, the Board found union picketing during the six-month period to have been undertaken for the unlawful purpose of obtaining recognition, although the only affirmative evidence of such purpose was based on acts done prior to that period, the decision is not inconsistent, so far as presently relevant, with the cases discussed above. Substantial evidence of purpose from within the limitations period was found in reliance on the inference that the earlier motive had continued unchanged. *Id.*, at 1428, 1438. While the permissibility of an inference of this nature was rejected in the preceding cases, we need not now inquire into this seeming disparity of treatment, for it affects the minor premise only, and does not impair the accuracy of the proposition that, however marshalled, acts within the limitations period must under Board doctrine yield some substantial evidence of unlawful conduct.

[14] *Katz* v. *Labor Board*, 196 F. 2d 411, and *Labor Board* v. *Gaynor News Co.*, 197 F. 2d 719, relied on below and in dissent here, arose under provisions of the Act (§ 8 (a) (3), 61 Stat. 140) since repealed (65 Stat. 601), which permitted union security agreements only with unions which possessed a Board certificate that a union security clause had been authorized at a special election of the employees involved. While the language, and perhaps the approach, of these cases may be considered inconsistent with the principles

The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms. Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered. As the dissenting Board members in this case recognized, in dealing with an agreement claimed to be void by reason of the union's lack of majority status at the time of its execution,

> ". . . the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis." 119 N. L. R. B., at 516.

In any real sense, then, the complaint in this case is "based upon" the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing *violation* solely by reason of circumstances existing only at the date of execution. To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of

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we deem governing here, the decisions on their facts present no such difficulty. Proof of the nonexistence of such a certificate, which of course was a continuing fact, plainly did not require resort to testimony about past events; rather the issue was much like one arising out of an agreement illegal on its face, the only difference being that a separate instrument was involved.

the limitations bar by a characterization which becomes apt only when that bar has already been lifted. Put another way, if the § 10 (b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a *suable* unfair labor practice only for six months following the making of the agreement.[15]

The Board's ruling is further sought to be supported on the ground that it did not rest on a formal finding that the execution of the 1954 agreement constituted an unfair labor practice. The Court of Appeals, while stating that the Board could not draw "any legal conclusion with regard to events outside the statutory period," distinguished the decision here as resting on the "mere *existence*

[15] We think the rule in conspiracy cases, where the statute of limitations only begins to run upon the commission of the last overt act in furtherance thereof, does not furnish a useful analogy in this case. The statute in question here bars issuance of a complaint "based upon any unfair labor practice" which occurred more than six months prior to the filing of the charge; it does not merely bar proceedings against an unfair labor practice which are not commenced within six months after that unfair labor practice has been committed. Cf. 18 U. S. C. § 3282. Our conclusion that the complaint giving rise to the judgment under review is of necessity "based upon" the unfair labor practice of execution of the agreement, and is barred by time, has drawn on this statute's purpose and history, and we do not assert the universal applicability of our resolution of the particular question presented for decision. In any event, the commission of an overt act pursuant to a conspiratorial agreement represents a renewed affirmation of the unlawful purpose of the conspiracy. The acts constituting enforcement of a collective bargaining agreement cannot well be so characterized. Beyond that, one may question the appropriateness of analogizing this situation, where proper application of a particular statute of limitations involves taking into account competing values, to one which involves an unlawful agreement of a kind unreservedly condemned, and the entire undoing of which is the undiluted purpose of the criminal law. Indeed, the rule advanced in dissent cannot be squared with the Board's own approach to the statute. See the cases discussed in notes 12 and 13, *ante*.

[of the facts surrounding the making of the 1954 contract], rather than on ascribing legal significance to those facts standing alone." 264 F. 2d, at 581 (emphasis by the court). This distinction sacrifices the policy of the Act to procedural formalities. If, as is not disputable, the § 10 (b) limitation was prompted by "complaint that people were being brought to book upon stale charges," *Labor Board* v. *Pennwoven, Inc.*, 194 F. 2d 521, 524, it is a particular *use* of the prelimitations facts or conduct at which the section is aimed, and it can hardly be thought relevant that the proscribed use has not been labeled as such. The applicability of the policy of § 10 (b) in the *Grain Millers* case, *supra*, where in the particular circumstances of that case, and not because of anything arising from § 10 (b), the challenged acts within the limitations period could not be condemned as unlawful without an express declaration that earlier conduct constituted an unfair labor practice (see note 12, *ante*), was not greater than it is here, where although there was no "finding" that execution of the agreement constituted an unfair labor practice, it is manifest that were that not in fact the case enforcement of the agreement would carry no taint of illegality. The availability of the repose sought to be assured by § 10 (b) cannot turn on the vagaries of any such hypertechnical distinctions, bearing no relation to the purpose of the legislation.

It is apparently not disputed that the Board's position would withdraw virtually all limitations protection from collective bargaining agreements attacked on the ground asserted here. For, once the principle on which the decision below rests is accepted, so long as the contract—or any renewal thereof—is still in effect, the six-month period does not even begin to run. Cf. *Bowen Products Corp.*, *supra*, at 732. In *Lively Photos, Inc.*, 123 N. L. R. B. — (No. 126), the Board unhesitatingly applied the doctrine of the case at bar to an attack upon

an agreement executed more than three and one-half years prior to the filing of the charge. The cease-and-desist order entered in that case directed the severance of a bargaining relationship which had been initiated five years earlier. A doctrine which does such disservice to stability of bargaining relationships could be upheld, in light of the language and evident purpose of § 10 (b), only by a convincing showing that Congress did not intend that provision to be applied so as to bar attacks on collective agreements with unions lacking majority status unless brought within six months of their execution. Far from providing such a showing, the legislative history contains affirmative evidence that Congress was specifically advertent to the problem of agreements with minority unions, had previously been at pains to protect such agreements from belated attack, and manifested an intention, in enacting § 10 (b), not to withdraw that protection.

Four years prior to the enactment of the Taft-Hartley amendments, of which the § 10 (b) limitations proviso was one, Congress barred the Board from proceeding, under certain conditions not here relevant, in cases "arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed." National Labor Relations Board Appropriations Act, 1944, 57 Stat. 515. This legislation was enacted with specific reference to agreements with minority unions,[18] and was re-enacted in each

[18] The immediate impetus to the legislation was the pendency of an N. L. R. B. proceeding involving a closed-shop agreement in effect at the Kaiser shipbuilding yards at Portland, Oregon. The agreement, though executed at a time when only 66 workers were employed, was being applied to a 20,000-man work force. The debates show that the issue of representation by minority unions was in the forefront of legislative concern. See 89 Cong. Rec. 6950 (remarks of Reps. Smith and Tarver), 6953 (Rep. Tarver), 7029 (Sens. Truman and Ball), 7031-7032 (Sen. Wagner).

succeeding session through 1947.[17] At the time the Senate Committee on Labor and Public Welfare reported S. 1126 (the Senate version of the proposed legislation enacted as the Labor Management Relations Act, 1947), a rider to the appropriations bill for the fiscal year 1948 (H. R. 2700, 80th Cong., 1st Sess.) was pending before the Senate Appropriations Committee, having been previously reported by the House Appropriations Committee in language identical with that of its predecessors. The Labor Committee's discussion of the proposed § 10 (b) amendment is illuminating:

> "The principal substantive change in this section is a provision for a 6-month period of limitations upon the filing of charges. The Board itself by adopting a doctrine of laches has to some extent discouraged dilatory filing of charges, and a rider to the current appropriations bill (*which if this amendment was adopted would no longer be necessary*) contains a 3-month period of limitations with respect to certain kinds of unfair labor practices." S. Rep. No. 105, 80th Cong., 1st Sess., p. 26. (Emphasis added.)

This language cannot be squared with an interpretation of § 10 (b) which would ascribe to Congress, in enacting for the first time a general limitations provision, a purpose to eliminate the then-existing all-embracing limitation specifically applicable to agreements with minority unions.[18]

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[17] The National Labor Relations Board Appropriations Act, 1945, 58 Stat. 368, made several amendments in the limitations provisions, the principal of which were designed to render the rider inapplicable to agreements with company-dominated unions, and to provide an additional three-month period at the commencement of any renewal of an agreement in which a complaint could be filed. See 9 N. L. R. B. Ann. Rep. (1944), pp. 5–6. Subsequent re-enactments were without relevant change. 59 Stat. 378, 60 Stat. 698.

[18] This conclusion seems to us not vitiated by the fact that the Senate Appropriations Committee, subsequent to the issuance of the

In sustaining the Board's position, the Court of Appeals also relied on the public character of the right sought to be vindicated by the Board, and the limited scope of judicial review of Board determinations. Observing that "in interpreting, applying and administering a statute of limitations prescribed by Congress in this context [the field of labor relations], the Board—and the courts—are not confronted by precisely the same considerations as apply to statutes of limitations affecting the private rights of two individual litigants," the Court reasoned that "the Board may have thought that the interests of [employee] self determination outweighed otherwise important competing considerations of burying stale disputes." 264 F. 2d, at 581–582. We think this analysis inadmissible here, for the reason that the accommodation between these competing factors has already been made by Congress. It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act"

Labor Committee Report, amended the appropriations rider in a manner perhaps susceptible of an interpretation which would render it inapplicable to agreements with minority unions. S. Rep. No. 146, 80th Cong., 1st Sess., pp. 6, 13. Nor is it sufficient to attempt to explain away the language of the Committee Report by reliance on the fact that, while the appropriations riders immunized agreements invalid on their face as well as those invalid for lack of majority status, see 8 N. L. R. B. Ann. Rep. (1943), pp. 7–8, § 10 (b) is more narrowly framed, and concededly does not protect an agreement invalid on its face from attack six months after its execution. Under the broad union security proviso to § 8 (3) of the original Act, 49 Stat. 452, invalidity of an agreement on its face was not a common problem, and we should not have expected Congressional discussion to have been primarily concerned with it. As we have seen, however, agreements with minority unions were specifically the focus of Congressional attention in this period, and the direct relevance of the Committee's discussion to the history of that problem is evident.

is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. Cf. Note 7, *ante*. It may be asserted, without fear of contradiction, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the over-all purpose of the Act to secure." *Labor Board* v. *Childs Co.*, 195 F. 2d 617, 621–622 (concurring opinion of L. Hand, J.). Cf. *Colgate Co.* v. *Labor Board*, 338 U. S. 355, 362–363. As expositor of the national interest, Congress, in the judgment that a six-month limitations period did "not seem unreasonable," H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights.[19] "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy . . . ." *Colgate Co.* v. *Labor Board*, *supra*, at 363. Cf. *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31, 47.

Reversed.

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[19] Adoption of a six-month period of limitations, criticized by opponents of the legislation as "the shortest statute of limitations known to the law," S. Rep. No. 105 (pt. II), 80th Cong., 1st Sess., p. 5 (Minority Report), was resisted on the ground that it gave "unjust assistance to employers or unions which commit those types of practices which are easily concealed and difficult to detect." 93 Cong. Rec. 4905 (remarks of Sen. Murray).

It need hardly be pointed out that we are not dealing with a case of fraudulent concealment alleged to toll the statute. See 264 F. 2d, at 583 (dissenting opinion).

SUPREME COURT OF THE UNITED STATES

No. 44.—October Term, 1959.

Local Lodge No. 1424, etc., et al., Petitioners, v. National Labor Relations Board.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April 25, 1960.]

Mr. Justice Frankfurter, dissenting.

While agreeing with my Brother Whittaker's grounds for dissenting, I should like to add confirming considerations for his conclusion. At a time when the union did not represent a majority of employees, union and employer entered into a collective bargaining agreement, containing a "union security" clause compelling all employees to become members of the union. Under principles accepted by the Court, this constituted an "unfair labor practice," for it tended "to restrain or coerce employees" in the exercise of their right "to bargain collectively through representatives of their own choosing." Union and employer continued to carry out the terms of this illicit agreement. Specifically, the union acted as the unauthorized bargaining agent, union dues were collected through a "check-off" by the employer, and employees were compelled to become members of the union within forty-five days. The Court's opinion recognizes that all this constituted continuing interference with the employees' free choice and was therefore a continuing unfair labor practice.

Ten months after the collective agreement was first entered into, but while its terms continued to be actively carried out, an unfair labor practice charge against the union and employer was filed with the Board. Plainly,

the continuing unfair labor practice of maintaining the collective agreement illegally entered into did occur within six months of the filing of the charge. The Court accepts this as true. But the Court holds that a charge based upon that continuing unfair practice is time-barred.

The applicable statute of limitations provides: "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The Court relies on the fact that the active carrying out of the agreement, concededly an unfair practice occurring within six months, is revealed as unlawful only by reason of the unlawful character of the agreement at its inception, specifically, the fact that the union did not represent a majority of employees at that time. The Court concludes that the action is barred because the inception of the unlawful agreement was outside of the statutory period.

Such an interpretation, I respectfully submit, is not to enforce congressional legislation, which is our task, but is to fashion linguistic legislation and then apply it. Instead of barring only those complaints "based upon any unfair labor practice *occurring* more than six months prior to the filing of the charge," the statute is made to read "based upon any unfair labor practice *having had its inception* more than six months prior to the filing of the charge." Thus the complaint is held barred, even though an unfair practice did *occur*, with due regard to the thought conveyed by that word. That is, we have here not mere inert continuity of consequences through antecedent action; events were brought to pass through conscious human intervention within six months of the filing of the charge.

I see no justification for such rewriting of what Congress wrote. The legislative history recited by the Court makes no such demand. Congress no doubt wanted to put stale claims to rest, and it did so by a relatively short

statute of limitations for permitting claims to be brought to litigation. If six months are allowed to pass by without a charge against an unfair labor practice being filed, Congress said that is an end of the matter, and a charge cannot be filed thereafter. But Congress did not say that if a charge is filed within six months of the occurrence of an unfair practice, that cannot be halted, that cannot be proceeded against, if such labor practice had its inception more than six months before. On the contrary, what I deem a controlling analogy leads me to apply the statute as I find it, and to bar complaints only when based upon active occurrences not falling within the six-month period. I find that analogy in the treatment of the same kind of problem in cases where a conspiracy is entered into before a statutory period but is actively kept alive within that period.

The essence of the unfair labor practice involved in this case is the making and maintaining of an illegal agreement between union and employee. Suppose that Congress, having defined such an agreement to be an unfair labor practice, had subjected it not only to civil remedies but had also made it a misdemeanor. That is by no means a fanciful supposition. The federal anti-trust statutes are a prominent instance of the use of the criminal law, and in particular the law of conspiracy, as part of a scheme of industrial regulation. Suppose a six-month statutory limitations period for the criminal charge, as we now have for the civil, and suppose the very facts of this case. Specifically, suppose it had been charged that during the prior six months, by maintaining their collective agreement, entered into when the union did not represent a majority of employees, the union and employer had conspired to deprive employees of their rights freely to choose bargaining representatives, and that during those six months overt acts had been committed in pursuance of the unlawful agreement.

To find a cognate statute of limitations to be a bar to such a case would be to ignore the applicable precedents. The rules set out by this Court for applying statutes of limitations to conspiracy cases are clearly otherwise. See *United States* v. *Kissel*, 218 U. S. 601; *Hyde* v. *United States*, 225 U. S. 347, 367–370; *Brown* v. *Elliott*, 225 U. S. 392, 400–401; *Fiswick* v. *United States*, 329 U. S. 211, 216; *Grunewald* v. *United States*, 353 U. S. 391, 396–397. "The statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy." *Fiswick* v. *United States*, *supra*, at 216. And these cases show that this principle applies even when, as here, the overt acts within the statutory period derive their illegal significance only when interpreted in light of an illegal agreement which was initiated prior to the statutory period for bringing a charge. Certainly, the illegalities committed within the six-months period in this case, to the same degree as overt acts in pursuance of a conspiracy already formed, represent "a renewed affirmation of unlawful purpose," expressed in an agreement which Congress has outlawed as an unfair labor practice. A conspiracy is kept alive by an overt act within the period of the statute of limitations not by reason of some dogmatic postulate relevant to conspiracies, but as a result of judicial reasoning in applying statutes of limitations. This reasoning is equally applicable to the matter in hand.

I'm baffled to understand why the present case should be different from what it would be were it a prosecution for criminal conspiracy, rather than a civil proceeding based on an agreement giving rise to an unfair labor practice.

SUPREME COURT OF THE UNITED STATES

No. 44.—October Term, 1959.

Local Lodge No. 1424, etc., et al., Petitioners, v. National Labor Relations Board.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April 25, 1960.]

Mr. Justice Whittaker, with whom Mr. Justice Frankfurter joins, dissenting.

The Court correctly recognizes (1) that it is violative of employees' rights guaranteed by § 7, and an unfair labor practice by an employer under § 8 (a) and by a labor union under § 8 (b), of the National Labor Relations Act, for an employer and a labor union to enter into a contract providing either for the recognition by the employer of the union as the representative of its employees or that its employees must become and remain members of the union, unless the union, at that time, represented a majority of the employees in the unit, (2) that "The maintaining of such an agreement in force is a continuing violation of the Act," and (3) that the bargaining contract involved in this case both recognized the union as the exclusive bargaining representative of the employees and required them to become and remain members of the union, although the union did not then represent a majority of the employees in the unit.*

Despite the foregoing, the Court holds, I think, with deference, quite inconsistently and erroneously, that § 10 (b) of the Act barred the issuance of a complaint,

*In fact, the undisputed testimony was that the union did not then represent a single one of the employees, and that the employer acceded to the union's demand for recognition and entered into the contract simply because the union had it "over a barrel."

upon an employee's charge filed with and served by the Board 10 months after the making of the contract, based not upon the making of the contract, but alleging that, within and throughout the period of six months preceding the filing and service of the charge, the employer and the union required the employees to become and remain members of the union, and, once in each of those six months, caused certain sums to be deducted from the employees' wages and paid over to the union, all without the authorization of the employees.

The Court, noting the employer-union contention that the contract was "tainted" only by its "unlawful execution," and that "since a complaint based upon *that* unfair labor practice [would be] barred" by § 10 (b), *that event* could not be utilized "to *infuse with illegality* the *otherwise legal* union security clause or its enforcement," adopts that argument as presenting the "correct view." (Emphasis added.)

Surely the fact that a prosecution for the *making* of a "tainted" contract is barred by limitations does not "infuse" the "tainted" contract with *legality*. Moreover, I respectfully submit that the complaint here was not based upon the "tainted" contract, and that its unlawful *execution* was not utilized "to infuse the [always illegal] contract with illegality." Rather, the complaint here was based upon, and limited to independent acts of the employer and the union, committed within six months preceding the filing and service of the charge, that deprived the employees of rights guaranteed to them by § 7, resulting in unfair labor practices under § 8; and the fact that prosecution for the illegal *execution* of the "tainted" contract is time-barred, as an independent wrong, may not be utilized "to infuse with" *legality* the illegal "union security clause or its enforcement."

It is important carefully to note what it is that § 10 (b) bars. It says, in relevant part, that "*no complaint* shall

issue *based upon* any unfair labor practice *occurring more* than six months prior to the filing of the charge. . . ." (Emphasis added.) The bar is, then, against the issuance of a "complaint" that is "based upon" acts "occurring more" than six months prior to the filing of the charge. In the plainest possible sense, then, it does not bar the *issuance of a complaint based upon acts occurring within six months of the filing of the charge.* The complaint that was issued here was based upon acts occurring within six months of the filing of the charge. And the Board rested its decision solely on those acts.

But the Court holds that, although § 10 (b) is only a statute of limitations, evidence of the illegality of the contract is inadmissible, in the circumstances of this case, because it would serve "to cloak with illegality that which was otherwise lawful," and would permit a time-barred event "to be so used [as to revive] a legally defunct unfair labor practice." This conclusion gives lip rather than heed to the conceded rule that "the maintenance of such an agreement in force is a continuing violation of the Act," for it makes incompetent all relevant evidence that may be adduced to prove the "continuing violation." Moreover, such a rule is contrary to the decisions of this Court and to every decision of the Courts of Appeals upon the point to which our attention has been directed.

In *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, this Court held it to be:

> "well within the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis of a suit, may, nevertheless, be introduced if it tends reasonable to show the purpose and character of the particular transaction under scrutiny. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 46–67; *United States* v. *Reading Co.*, 253 U. S. 26, 43–44." 333 U. S., at 705.

To the same effect, but directly dealing with unfair labor practices, are *Paramount Cap Mfg. Co.* v. *Labor Board*, 260 F. 2d 109, 112–113 (C. A. 8th Cir.); *Labor Board* v. *Gaynor News Co.*, 197 F. 2d 719, 722 (C. A. 2d Cir.), aff'd *sub nom.*, *Radio Officers* v. *Labor Board*, 347 U. S. 17; *Katz* v. *Labor Board*, 196 F. 2d 411, 415 (C. A. 9th Cir.); *Labor Board* v. *General Shoe Corp.*, 192 F. 2d 504, 507 (C. A. 6th Cir.); *Labor Board* v. *Clausen*, 180 F. 2d 439, 443 (C. A. 3d Cir.); *Superior Engraving Co.* v. *Labor Board*, 183 F. 2d 783, 791 (C. A. 7th Cir.).

In the *Katz* case, almost identical with this one on the point in issue, the Court specifically rejected the contention that, inasmuch as more than six months had expired from the date of the *execution* of the tainted contract, the complaint, based upon acts occurring within six months of the charge, was barred by § 10 (b), saying:

> "While . . . the mere execution of the agreement on December 17, 1948, constituted an unfair labor practice, there is no doubt but that the continuous enforcement of the agreement thereafter within the six months period prior to the filing of the charge, was an unfair labor practice, and with respect to this continued and continuous enforcement of the illegal union shop agreement, the prosecution of the proceeding was not barred by limitations." 196 F. 2d, at 415.

In the *Gaynor* case, the Court, after pointing out that although the tainted contract had been executed more than six months prior to the filing of the charge, and its *execution* was therefore barred as an independent subject of punishment by § 10 (b), observed that enforcement of the contract was "a continuing offense," and held that the complaint, based only on acts occurring within six months

of the filing of the charge, was lawfully issued and "in all respects valid." 197 F. 2d, at 722.

Although still recognizing that enforcement of a tainted labor contract "is a continuing violation" of the law, the Court further says that this is true "solely by reason of circumstances existing only at the date of execution"; and it therefore concludes that evidence of the taint is inadmissible in a proceeding to punish unlawful conduct occurring from enforcement of the contract within six months of the filing of a charge. I respectfully submit it is plain that this reasoning negates the conceded rule that enforcement of a tainted contract is "a continuing offense." The Court's reasoning, inconsistently, would at once both recognize, and deny any means of proving, the "continuing offense."

Analytical curiosity provokes the query whether such an *illegal* contract, openly posted in the plant but not made effective in practice until the first day of the seventh month, would then become so "infused" with *legality* as to be unassailable by the employees—not because its enforcement is not "a continuing offense," but, rather, because, under the Court's rule, there can be no competent evidence of its illegality. If so, the rule of "continuing offense" is utterly destroyed. If not, the Court's rule that there can be no competent evidence of the continuing violation must give way. The two theories are diametrically opposed and self-destructive. Section 10 (b) does not at all deal with the competency or admissibility of evidence. Surely, as the cited cases hold, any evidence which shows that continuing enforcement of the contract is or is not an offense under the Act is competent under the law.

But there is even a more fundamental consideration which, for me, settles this issue beyond all controversy. While it is the burden of the General Counsel of the Board

to prove his case, all he need do, initially at least, is to make a prima facie case. He may do this, in a case like the present, simply by putting on evidence showing that the employer and the union, within six months preceding the filing of the charge, required the employees to become and remain members of the union and to submit to deduction of dues from their wages without asking them for authorization and without any election, or Board certification of the union. That evidence alone would raise prima facie the issue: By what right was this done? That issue would call for a defense, and the burden of producing the defense would necessarily fall upon the employer and the union. Surely it will not be said that anything in § 10 (b), or elsewhere in the law, makes incompetent all evidence that might be adduced by the employer and the union to meet their burden and justify their action. If, as I submit cannot be denied, such evidence is competent when offered by the employer and the union, it must likewise be competent when, if he so elects, it is offered by the General Counsel of the Board. Here, at the very least, the General Counsel made a prima facie case of continuing violations of the law within the six months preceding the filing of the charge; the employer and the union made no effort to show the legality of their conduct in the period complained of.

The Court attributes to its rule the virtues of quieting "stale claims" and of "stabilizing existing bargaining relationships." I cannot agree that it would do either, for employee rights, occurring within six months of the filing of the charge are not "stale claims," and deprivation of those rights which, as the Court of Appeals said, "rankles at least once a month in the minds of [the employees] offended," is not conducive to industrial peace and would not—certainly not legally—"stabilize existing bargaining relationships." At all events, and however this may be, these matters were for Congress; and the cardinal pur-

poses of the National Labor Relations Act, contained in § 7, were to guarantee to employees the right to join or assist labor organizations "of their own choosing" or to refrain from such activities. Surely, the continuing offense of enforcing a contract, made by an employer with a union which was not of the employees' "own choosing," was not intended by Congress to be left without a remedy. Congress did not intend to create and "to hold out to [employees] an illusory right for which it was denying them a remedy." *Graham* v. *Brotherhood of Firemen*, 338 U. S. 232, 240. Certainly, "any limitation on the employees' right[s] under §§ 7 and 8 . . . must be more explicit and clear than it is here in order to restrict them at the very time they may be most needed." *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, 287. See also *Labor Board* v. *Lion Oil Co.*, 352 U. S. 282, 289.

Believing that the Board and the Court of Appeals correctly decided this case, I would affirm the judgment.